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SENATE ECONOMIC DEVELOPMENT COMMITTEE
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TAPE 1

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CHAIR : Thank you Mr. Armstrong we appreciate you being here. We do have several others that would like to be registered on uh, for the bill but do not wish to testify. Susan Walters Bize, Bize.

BIZE : Bize.

CHAIR : Bize, uh from the J C Penney Company, but does not wish to testify, Tom Hester with G E Capital for the bill, but does not wish to testify, Charles Ross, for the bill, but does not wish to testify. Is there anyone else in the audience who would like to testify for or against the bill? Hearing none I'll close the public hearing and leave this bill pending, we, oh I'm sorry was there a substitute?

CLERK : Yeah.

CHAIR : Sorry, we need to adopt the Committee Substitute that was actually laid out not the uh, House version.

ELLIS : Did somebody send it up?

CHAIR : Senator Sibley did that.

ELLIS : No, I was just gonna send it up.

CHAIR : Would you move, would you move--

ELLIS : Yeah, I, I move we adopt the Committee Substitute.

CHAIR : --Okay any objection? Move that we will adopt the Committee Substitute we will leave this bill pending at the request of the Chair. We, we will be in recess until three o'clock, ten minutes.

ELLIS : This the last bill?

CHAIR : Nope, we have one, we have two more bills D-T-P-A is about to come to us and I believe there's uh Senator Cain have a bill? It was tagged. Excuse me.

CLERK : (Inaudible)

CHAIR : Okay so we're just waiting D-T-P-A and I believe it should be in ten minutes.

ELLIS : I'd like to ask that unanimous consent to be shown with the Chair on the bills that were voted on previously.

CHAIR : Hearing any--any objection, hearing no objections Senator Ellis will be shown voting unanimously--

ELLIS : And in case I'm not here I'd like to ask to be shown for this bill--

CHAIR : --and, if you would--

ELLIS : --for the folks in Plano.

CHAIR : --you would, you would, thank you. (Inaudible) on this bill but he says he wants to be shown voting for this bill.

(RECESS)

(Senator Sibley in the Chair)

CHAIRMAN : At this time the Chair will lay out, ah, House Bill 668 by Junell and recognize the Senate sponsor, Senator Bivins.

BIVINS : Thank you Mr. Chairman and Members. Ah, House Bill 668 is, is the House version of the Senate bill that we had a hearing on early in the session but left pending, ah, before this Committee. Ah, the bill that the House has passed is significantly different from the bill that I filed and that we

heard in this Committee earlier in the session. What I would say, first and foremost, is that, ah, the reforms to the Deceptive Trade Practices Act in House Bill 668, ah, first and foremost, ensure that this Act remains a consumer protection device. Somebody said one time that the only place in, in at least civil justice that we wanna ensure that we have an unlevel playing field, is in the area of consumer protection. And I think that, ah, what the House has done with some of the amendments to perfect, ah, what the House intended to do, that we have here today, will accomplish that goal. The bill would limit the application of the Deceptive Trade Practices Act, to transaction which do not exceed a half a million dollars. And when there is a written contract involved where a party was represented by counsel, transaction limits would be a hundred thousand dollars. The DTPA still applies to a cause of action involving a consumer's residence. That of course is typically the largest consumer transaction that, that most of us engage in, ah, in our lifetime, so those would be, ah, or consumer's residence would be outside these transaction caps. The bill exempts claims or causes of action based on professional advise, opinion, judgment, or similar skill. Ah, the bill that I filed, ah, attempted to exempt a group of professionals, ah, ah, in, in an effort to get at the issue of using the DTPA against a professional, ah, in a situation where I don't believe it was ever originally intended to be used. The classic situation is where a prof--where there's more than one right answer, ah, in an instance where a consumer is get---(verbiage lost due to changing of the tape).

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BIVINS : ---causes of action that are, that are based on, ah, transactions, I believe the language is the essence of which is, ah, professional advise, opinion or judgment, or similar skill, would not be actual under DTPA. However, ah, we go on in the bill to say that this is not intended to protect professionals who are in fact engaging in deceitful and deceptive trade practices. We, we try to get at that tough issue and I believe we've done, the House sponsors have done a good job in addressing it. Ah, the bill eliminates the automatic doubling of damages under a thousand dollars. It prohibits the use of the DTPA in personal injury and wrongful death actions. It excludes damages for physical pain, loss of consortium, disfigurement, physical impairment or loss of companionship in society. It would still allow a consumer to recover, ah, for mental anguish. We have amendments here that clarify how that mental anguish fits into, ah, the bill, ah, that, that hopefully will be voted out of this Committee. Ah, it, it, I think very importantly, provides incentives for settlement of DTPA claims through a new offer of settlement in alternative dispute resolution. That was agreed on early between all of the parties, ah, negotiating this bill. The bill incorporates the joint and several liability and comparative responsibility requirements from other tort reform bills that have passed, ah, this legislative session. Ah, it eliminates private causes of action of violations of Texas Department of Insurance rules and regulations. However, it adds the unfair settlement practices from the TDI rules and regulations to the text of the ah, ah, Insurance Code, Article 2121 where there is a list of, of violations under the Insurance DTPA, ah, action. It eliminates automatic doubling of damages under

a thousand dollars and provides for discretionary trebling of damages for actions brought under, ah, the ah, ah, 2121 DTPA Section. They had a situation where the Deceptive Trade Practices Act, under the Business and Commerce Code, allowed for, ah, trebling of damages, but under 2121 it required trebling of damages, and this bill would change it to where those--that trebling can be permissive, the same way it is under the, ah, existing DTPA.

ELLIS : Say, say that one again, Mr. Chairman, Senator, before that I missed---

CHAIRMAN : Senator Ellis.

ELLIS : Did you say it eliminates trebling of damages for causes of action under a thousand dollars?

BIVINS : Uh---

ELLIS : Before you did this one, I thought I heard you say that on another one.

BIVINS : Yeah. It eliminates automatic--under the current law, for claims under a hundred thousand dollars--I'm sorry, for claims under a thousand dollars, there is an automatic doubling provision and this, this bill would eliminate that. And that, that was principally a concern of retailers who believe that, that that automatic feature of the bill has precipitated a lot of nuisance lawsuits that they wind up being forced to settle where they, they really aren't fair claims.

ELLIS : Let me just--cur--if I might, Mr. Chairman, 'cause it just caught my attention. I know when you presented this before, the Senate bill version, the thought was you were wanting a change in DTPA because the original intent was to help consumers.

BIVINS : Right.

ELLIS : Little people who have to go up against big people.

BIVINS : Right.

ELLIS : And sometimes that's difficult for them to do that and there have been abuses where big people have gone after other big people. And that just caught my attention, if it's under a thousand dol--I mean how many did they ha--could there be that many?

BIVINS : Claims? I'm not aware---

ELLIS : I'll ask 'em when they come up. I mean that was just, more than anything, just struck me. You know---

BIVINS : We do have, we do have people here that, if the Chair chooses to allow testimony---

ELLIS : I can wait till we get to it but that one just caught my attention.

BIVINS : Yeah.

CHAIRMAN : Let me explain how we're gonna run this one. We're really not taking public testimony. We will invite public testimony and I, of course, will honor any Senator's request.

ELLIS : Well maybe you oughta, on that one at least, and maybe you would know who the best person is. I just--I mean I understand the fight with the big folks and the big folks---

CHAIRMAN : Right.

ELLIS : ---but if you're talking about a case under a thousand

dollars, I just want some--whoever can come up here and me about the thousands that have flooded the courts.

CHAIRMAN : Right.

ELLIS : Which is why they want that provision in.

BIVINS : Okay, I think, ah, we've got a representative here from the, ah, Automobile Dealer's Association. They could speak to that issue. Ah, Members I've---

ELLIS : Chair would do that now, Mr. Chairman?

CHAIRMAN : Yes, who, who do you want?

BIVINS : That'd be fine if Mr. (Fondren's) here or Tom (Blanton), I saw in the audience a minute ago.

LEEDOM : While you're doing that, Mr. Chairman, may I ask him a question?

CHAIRMAN : Sure, Senator Leedom.

LEEDOM : Senator it's my understanding a great deal of the difficulties have been worked out with the various parties on this bill.

BIVINS : I, I think that's correct, Senator. We, ah, the night before the House took up the tort reform bills, ah, there was, ah, an effort made to package all the tort reform bills into an agreed package, and DTPA is part of that package. Those negotiations went on into the next morning and finally, right before we went on the floor, we had agreements. Ah, it has developed that as that bill was drafted, there were concerns that there were drafting glitches, and I've been working with the, ah, Bill Whitehurst of the Trial Lawyer's Association for the past 36 hours on those glitches. And I think it's fair to represent that we have agreement now between myself and, ah, the Texas Trial Lawyer's Association, as well as other proponents of the bill.

ELLIS : If I might, Mr. Chairman.

CHAIRMAN : I'm sorry, Senator Leedom were you through?

LEEDOM : Yes.

CHAIRMAN : Senator Ellis.

ELLIS : If I might on, on that point, I, I'm told and I'm not sure who can advise me on it, maybe somebody who's an expert on the insurance, ah, I have an amendment, which I don't know if you've seen it or not.

BIVINS : I've not.

ELLIS : Ah, ah, when we get to the amendments where I wanna delete the words accident or health insurance. I think---

CHAIRMAN : What page are you on?

ELLIS : Ah, it'll be, ah, I guess I'll pass the amendment, Section 11 on Line 11, Page 27. Section 11, Line 11, Page 27.

CHAIRMAN : Let's see, pa--Line 11?

ELLIS : Uh huh, Page 27. Let me turn it to it myself. I guess this is under unfair discrimination. Okay, here it is. Section 11, Line 11.

BIVINS : Section 11. Where is that?

CHAIRMAN : Page 27.

ELLIS : I guess I'm looking in the House Bill. Is there a Substitute?

CHAIRMAN : You want to delete the words accident or health insurance?

ELLIS : Yeah, and I wanna make sure that--oh, here it is.

Ah, if you're going to, ah, ah, eliminate--here it is here. If--what I'm trying to do is, is simply take existing statute language and apply it to more than health insurance. And my concern is, if it's important enough to protect and preserve the private cause of action for health insurance, it oughta be equally as important to apply the same protections to folks who are seeking coverage in other lines. And, and I, and I, you know I--you'd be the one to answer it, if you could tell me which one of the resource people here could, tell me why you would go in, ah, and, and why you'd have a problem with this amendment, if you have a problem. Maybe you don't have a problem with it and I shouldn't even ask the question.

BIVINS : Ah, this, this clearly was not a part of the agreement that I was party to, and I'd have to ask, ah, Wade Spilman maybe if he could answer that question for you Senator.

ELLIS : Okay.

CHAIRMAN : Mr. Spilman.

SPILMAN : I'll try to answer any questions, Senator Ellis, about any of the insurance provisions.

BIVINS : Would you sit down and tell us your name?

SPILMAN : My name is---

CHAIRMAN : Would you identify yourself, please Sir?

SPILMAN : Excuse me, my name is Wade Spilman, I'm an attorney for the Independent Insurance Agents of Texas and I did participate in the extensive negotiations on this bill for several months with the trial lawyers and others who had an interest.

ELLIS : You were, you were representing Independent Insurance?

SPILMAN : Independent Insurance Agents.

ELLIS : Okay.

SPILMAN : Ah, I did not--obviously I don't represent insurance companies, that's ag--agents. And of course based on those negotiations we did discuss the very issues you're talking about. That was in a committee substitute, the very provision you're suggesting to put back in. It came out of the, ah, House State Affairs Committee, it was taken out of the bill in the negotiations that ensued. It was simply one of those items that were negotiated. Ah, for what it's worth, we think the negotiated, ah, agreement is worthy of everybody's support.

ELLIS : Ever--everybody who agreed. See the problem is, let me, let me say---

SPILMAN : Everybody agreed, and I, I understand your absolute---

ELLIS : ---I spent a little time, I spent a little time on this redlining issue---

SPILMAN : Yes Sir.

ELLIS : ---and it's real nice, all the folks who, who have a stake in it and, and can afford a lobbyist, get to the table and they all sit down and grin, they're real happy. But the problem is, who sort of stands up for those consumers out there who, who end up being redlined, that's what I'm worried about.

SPILMAN : Well I understand perfectly and nobody would ask that you agree to something that somebody else agreed to. I just was reciting that for what it's worth.

ELLIS : Uh huh.
SPILMAN : Ah, see---
ELLIS : Well what is the problem with--do you have a problem with this amendment? It's alright with you?
SPILMAN : No, ah, actually I don't think it's alright with the industry but, ah---
ELLIS : Why? Maybe just walk the committee members through.
SPILMAN : Well, the ah--I don't know that I can walk the committee members through.
ELLIS : Did I give you a copy of it, by the way?
SPILMAN : No, I, I'm looking at the bill and I, I understand where it, ah, where it, ah, is. It's in ah, it's in 7(b), Subdivision 7(b), you're talking about?
: Yes.
SPILMAN : Talking about taking accident or health, so that this will, ah---
ELLIS : So you--so right now, the way it's drafted, I think, and you gotta help me through it---
SPILMAN : Yes.
ELLIS : ---you preserve a private cause of action for accident or health insurance, is that right?
SPILMAN : That is correct, that is correct.
ELLIS : Okay, so that means if it's automobile insurance or homeowners insurance, you ought not be--somebody made the decision, you ought not be in this privileged class, of being able to have a private cause of action, somebody else will protect you. I mean am I, am I getting it right?
SPILMAN : You are correct, you are correct. The provisions under unfair discrimination, meaning that you don't treat people in the same class of insurers the same way---
ELLIS : Uh huh.
SPILMAN : ---that---
ELLIS : So in, in my district, as an example, under what this bill would do, this, this cha--this revision of the Deceptive Trade Practices Act, to help my little 'ole grandmother living there on Carmen Street, if she thinks she's been redlined and the Insurance Department didn't do anything about it, she wouldn't have a right to a private cause of action because she couldn't get automobile insurance or health insurance, or life insurance, but if, but if she needed accident or health insurance and thought she oughta have a private cause of action, granny could mumble on down to the courthouse and have her private cause of action, 'cause she's privileged if it's accidental health. I just wanna make sure we understand what we're doing.
SPILMAN : The kind of discrimination you're talking about is addressed in the redlining bill.
ELLIS : Well let me tell you this, that bill ain't going nowhere.
SPILMAN : Well I don't, I don't know about that.
ELLIS : Number one and, and I'm looking at a letter from the insurance commissioner that I just had brought to me, where he said one

reason why he's not moving forward with redlining rules is because of House Bill 668, which has passed the House and is now pending before the Senate Economic Development Committee, removes any private cause of action based on the rules and regulations issued by the Department under Article 21.21. I believe it would be irresponsible for me--of me to allow new rules which create a private cause of action to go into effect on the eve of the expected legislation placing exclusive enforcement authority with the Department.

SPILMAN : I understand what you're saying.

ELLIS : But--so you see, I mean that's what I wanna, I wanna make sure my colleagues understand it 'cause we're playing games here and I want to know, from my dear friends, what the trial lawyers, if they've signed off on this I appreciate it, but I spent a hell of a lot of time on this issue during the interim, then somebody just walks in and thinks, well everything's happy and we're all nice, and tell your grandmother that the Department will take care of her. She can't, she has no right, she's not in a privileged class other than if she lives long enough to do something under the accidental health insurance line. But that's what, that's what this bill would do.

SPILMAN : I must tel--yes, I must tell you that, ah, that is not my issue, to argue, I happen to be here on an insurance matter.

ELLIS : I'm sorry you don't wanna, and I, I don't mean it personally when I do that, but it really does kind of rile me and I appreciate you making it clear to me.

CHAIRMAN : Anybody else wanna testify?

ELLIS : On that--(laughter). May--may--maybe somebody that, that wasn't in the room that signed off on the agreement. I'd like to have the trial lawyers come up here and explain this issue to me. I certainly have stood with them on a number of issue. I, I wanna know if, if they're signing on to let my grandmother get redlined, and can't have a private cause of action.

CHAIRMAN : Come on, come on down.

ELLIS : Come on down here, 'cause my grandmother, my grandmother's on the next plane up here. Before this sucker comes on the floor of the Senate I'm gonna have a serious discussion.

CHAIRMAN : We'll let you fill out a card afterwards.

WHITEHURST : Senator we agree with you.

CHAIRMAN : Could you identify yourself for the record please?

WHITEHURST : Ah, I'm---

: Oh no, he wouldn't do that. (laughter)

CHAIRMAN : Who is that? (laughter) Who is that masked man?

ELLIS : That's my grandfather. (laughter)

WHITEHURST : I'm Bill Whitehurst and I'm president of the Texas Trial Lawyer's Association and we agree with whatever Senator Ellis says. Ah, I was--I'm sorry that the individual who was actually in the room when that was being discussed is not here. Ah, all I can tell you is that, ah, we have negotiated this bill under great duress, and with all kinds of reservations of rights. Ah, I'm sure Mark Kincaid, who actually did that provision, ah, did that in exchange for something else which he thought was far more onerous. As you recall, Senator, the bill, as originally proposed, would have, for all practical matters, in our opinion, done away with the DTPA bill as an effective consumer rights. We have

done what we feel like is extensive damage control in trying to get back in, over in the House, some of the, ah, protections, ah, for consumers. We did not get them all back in and that is one which we obviously were not successful in getting in. If you can get it in, ah, I salute you.

ELLIS : Who was asking for it? Do you know or should I ask Mr. Kincaid?

WHITEHURST : Ah, I think it was ah--this does not come from, ah, Senator Bivins, I don't recall.

ELLIS : I'm sure it didn't.

WHITEHURST : Ah, I think this came from the, ah, insurance ah---

BIVINS : Well wait a minute, if I can Mr. Chairman. This is current law and I, the bill I filed maintained current law. A committee substitute came out of the House---

ELLIS : From the House side.

BIVINS : ---State Affairs Committee that had, had an amendment to current law. Representative Junell filed a floor substitute that returned us to current law. We're trying, we're not trying to deal with this issue top-side or bottom. This was not--redlining was the subject of another piece of legislation and it was not part of any of our discussion in DTPA.

ELLIS : I think somebody just loaded something in your bill, and I'm just trying to make sure that I get to the bottom of it.

BIVINS : No, no, no, I guess the legislature loaded current law in my bill. That's what's in my bill, Senator, is current law.

ELLIS : Let me put Mark Kincaid up here if I might.

CHAIRMAN : Well let me, just for my own clarification. This, this isn't underlined so this isn't new language.

BIVINS : No.

CHAIRMAN : This is maintaining current law.

BIVINS : That's right.

WHITEHURST : Yeah, what happened is the Seidlits' language, this was Seidlits' language that came out, was an addition. It was something that was added to the current law. And what was taken out in the negotiations, the last negotiations, was the addition to the current law. Senator Bivins simply tra--he simply tracked current law on this, on this portion. There was an effort to put that in, to add that to the bill, but it was taken, that addition was taken out. I think that's a good point and needs to be at least pointed out, that, that Senator Bivins, that was not in his--the additional language was not in his original bill, he simply did not address this, this part of the bill.

ELLIS : Let me ask if there--if, if you're through, someone from one of the consumer organizations to come up if they wanna comment on this.

JAMES : Reggie James representing the Southwest Regional Office of Consumers Union. Rob (Snyder) might be the more appropriate person but I'll take a stab at it.

ELLIS : Okay.

JAMES : I think I understand the issue. Ah---

ELLIS : Maybe I don't. Maybe just walk us through it again.

JAMES : Okay. This is, what you have in the bill that's not underlined language, where it says accident and health, because that is the

current law. But if this bill goes into law, the entire bill, that will not be, be the current law that we have in effect right now, even though this is the same language, because everything around it has changed. And what around it has changed is getting rid of an individuals ability to enforce the Department rules, can't do that anymore. So in order for a person to enforce anything that's not, ah, health, then they've gotta wait for the Department to do it, just as you pointed out. So in order to get the same protection that you have under current law, you would have to extend this language to the other lines of insurance. And we were not parties to the negotiations. I don't know why they made the decisions that they did make, ah, but the people that would be, the people who are injured or who would be harmed because of this language change, are people who ordinarily don't have a lot of stroke either in the legislative process or don't have enough money to hire attorneys.

CHAIRMAN : Senator Ellis, let me ask a question. Where in the bill did they strike the part about not being able to enforce Department rules?

JAMES : I, I might have to flip to find it.

CHAIRMAN : Somebody give me a reference.

BIVINS : I can just answer that what we--under current law, ah, someone can bring a private cause of action based on a rule promulgated by the Department of Insurance. And what we did is we repealed the citizens ability to do that in this bill. However, we---

ELLIS : That, that's the key. Say that again for me to make sure I understand if you don't mind.

BIVINS : We--I'm answering his question---

ELLIS : Yeah.

BIVINS : ---and then I'll answer yours. Then we rolled, we rolled into the bill the unfair claims practices, or settlement, ah, rules that had been adopted, so they then became actionable under the laundry list in 2121, okay. But the theory is, I don't know of any other place in the law where we, we created statutory action based on the violation of the Department's rule and regulation. The Department is charged with those duties. Ah, it's, in my mind, not good public policy to make those things which were adopted sometimes in very, ah, ah, different types of proceedings, the subject of a cause of action.

CHAIRMAN : Senator Ellis, I'm sorry, go ahead.

ELLIS : I'm sorry. On that point, Senator, 'cause I think maybe you're making it a little clearer to me now. If this bill does not pass, a citizen in Texas does have a right to go to court as a private individual and file a cause of action saying that they have been redlined, under current law. And what your bill will do, will eliminate that ability to file a private cause of action.

BIVINS : I guess that all depends on---

ELLIS : With this provision in there.

BIVINS : ---that depends on what the Department of Insurance does with the whole issue of redlining.

ELLIS : Okay that's--I just wanted to make sure I understand it, so but--because from the testimony earlier, it would lead me to believe that your bill didn't touch the ability of a private cause of action for redlining one way or the other.

BIVINS : This, this---

ELLIS : It will eliminate that?

BIVINS : It will eliminate for, for any rule adopted by the Department of Insurance, other than those that we rolled into this, this House engrossed version.

ELLIS : Okay, and I assume that you all didn't deem it appropriate to roll in some anti-redlining rules---

BIVINS : That's correct.

ELLIS : ---so people would have a right to file a private cause of action.

BIVINS : That's correct. As you know, Senator, there's other legislation going through the legislature right now that deals with that very subject.

ELLIS : What if it doesn't pass?

BIVINS : Well---

ELLIS : Then your bill will have eliminated a private cause of action for someone who feels that they were redlined.

BIVINS : That's correct, if it's based--only if it's based on DTPA. It doesn't change their ability to sue the insurance company on any other theories, it's just under the DTPA.

ELLIS : Okay, so what would be the problem with deleting the words, accident or health? Since you left in a provision for ac--accident or health insurance.

BIVINS : Because then you, you've broadened, substantially, the number of private causes of action that are out there. That is not my---

ELLIS : Why, why were these, why were these two so important?

BIVINS : They--we didn't wanna touch it one way or the other, this is just current law.

ELLIS : Mr. Chairman I really wish we could get somebody from the Insurance Department to come over and come on--and comment on this. I mean I know that we're, that, that we're moving fast and furious but I mean it, it's certainly gonna be an issue on the floor that we're gonna talk about for about 24 hours.

BIVINS : That's good.

ELLIS : Probably. He didn't need to go to church anyway. Did you wanna add anything else?

CHAIRMAN : I'm just looking if there's another resource witness. Mr. James I didn't mean to cut you off either.

JAMES : Oh no. My last comment was is that I think if you do add this language, then you are getting us closer to what the current law is at this very second.

ELLIS : So this amendment, if this amendment was added, it would put us where we are today.

JAMES : Right this moment.

ELLIS : Senator Bivins is that your understanding? If this amendment went on, it would put us back to where we are today?

BIVINS : Senator I hadn't--you didn't choose to share this amendment with in the past two months that we've been working on it.

ELLIS : I didn't know it was in your bill until this morning.

BIVINS : And so, and so I'm not really qualified to answer

that question right now.

ELLIS : Do you know if you have a resource person that might, Senator?

BIVINS : No I don't.

ELLIS : Okay.

JAMES : Thank you.

CHAIRMAN : Thank you. Let me ah, just, that you have a section of the bill here that says if a member of the insurance buying public has been damaged by an unlawful act or practice---

BIVINS : What page are you reading off, Senator?

CHAIRMAN : I'm sorry, ah, Page 40, starting Line 9. It says as defined in Section 4 of this Article. I've turned to Section 4 of the Article and, over here in the Insurance Code, and in Section 2121 they have unfair discrimination listed as a, as that. So it looks like a practice of, ah, unfair discrimination. Then read on, it says an individual damaged may bring an action on behalf of himself or others similarly situated. So I wonder if there's somebody, ah, looks to me like somebody could have a cause of action under DTPA---

BIVINS : For discrimination.

CHAIRMAN : ---for discrimination. So, I don't know if I'm being simplistic or there's something here I just didn't understand so, if somebody understand this, am I---

: You're right.

CHAIRMAN : ---interpreting that correctly?

SPILMAN : Mr. Chairman I, if I may I can tell you about that. There's no question that---

CHAIRMAN : You need to sit down and identify yourself please Sir.

SPILMAN : My name's Wade Spilman again, still, ah, and I represent the Independent Insurance Agents. There is no question or doubt, they have a cause of action for unfair discrimination. The point he's making is that you don't have a specific, ah, Black letter law called private cause of action for---

ELLIS : Pull your mike up a little, I can't hear.

SPILMAN : ---for the particular kind of unfair discrimination he's talking about, trying to add by taking out, ah, accident and health insurance, those two words. The ah, I think almost none could disagree that it's appropriate to take out rules and regulations as a basis for a private cause of action. The question comes, what do you put back into the law that are--is the legislators judgment, the legislature's judgment about what ought to be the subject of a private cause of action, subject to discretionary treble damages. You're saying that, ah, if it--as it has for many years applied to accident and health, why doesn't it apply to property and casualty insurance. Ah, there is unquestionably a private cause of action for unfair discrimination listed in those three subsections, but not specifically the things the Senator's talking about, that is true. And as ah, Senator Bivins said, the judgment was to leave the law like it was as to that issue, of unfair discrimination. Those things that are the basis of a private cause of action for unfair discrimination in the statute now are left there. Ah, it was thought that, ah, any issue on that, of that kind, oughta be taken up on the other bill, and I'm sure that was the judgment of those who tried to negotiate this issue.

ELLIS : Now you, since you represent the Independent

Insurance---

SPILMAN : Independent Insurance Agents.

ELLIS : ---in your judgment what is the--which bill are you talking about? I put in about five, I felt, I don't think you all are wanting to get any of 'em passed.

SPILMAN : The whole subject. But let me do say th--well the whole subject of redlining. Ah, the, the rules that are the--that you're discussing, that were adopted by the prior commissioner of insurance, that have been continued, about which there was a hearing yesterday, are not the effective law yet so technically those things cannot be the pri--the subject of a private cause of action under 2121---

ELLIS : But, but if he does, if---

SPILMAN : ---unless and until they become final and are enacted.

ELLIS : Okay. If he, if he decided to adopt them, he held a hearing yesterday which---

SPILMAN : That's correct.

ELLIS : ---which 15 members of the Senate requested him---

SPILMAN : I understand.

ELLIS : ---to hold. And in this letter that I just got, today's May the 11th, I, I think this is the letter dated today, just came over, he's saying that, ah, that he won't adopt the rules, he won't let the rules go into effect right now because of this bill. So obviously that Department has some interest in it. He's saying House Bill 668, which is now pending before the Economic Development Committee, removes any private cause of action based on rules or regulations issued by the Department under 2121.

SPILMAN : Yeah. But let me just make this comment and I'll stop.

ELLIS : So if he'd like to go forward with these rules, new commissioner, Governor Bush's commissioner.

SPILMAN : I understand.

ELLIS : The Governor has admitted there's a problem. Might not agree with me on how widespread, but he has agreed.

SPILMAN : Senator let me, let me just make this observation. If the Senate wants to make ah, ah, discrimination the basis of a private cause of action, subject to treble damages, they ought to write it into the law, as you're suggesting. But ah--and it oughtn't to be based on what the decision of some, ah, commissioner of insurance might be. There's no question that the better policy decision would be to do away with the rules and regulations, as the Senator has done and all others have done in these bills, ah, dealing with the DTPA and 2121, do away with rules and regulations adopted by somebody who is, is not elected by people, he's an appointee, or she is an appointee and they are, they're gonna be different, have different views about it from time to time, do away with that---

ELLIS : But why---

SPILMAN : ---then you---

ELLIS : ---well I mean why---

SPILMAN : ---then you, the legislature, put it on---

ELLIS : Let's discuss that. We come in for 140 days. I mean I think this discussion we've gone through today, I think I'm a relatively bright

guy, maybe not as bright as the geniuses on the committee, indicates for these 140 days I'm no expert on insurance, but we pay somebody over there a little more than six hundred dollars a month. A whole staff of people to do it year around and I assume you get paid year 'round to work this issue from whatever perspective you feel. Why, why couldn't we--why would we tie the hands of somebody we pay a hundred and fifty thousand dollars a year to look out for the best interest of the taxpayers of Texas. Don't have to be elected.

SPILMAN : Well I, I don't wanna--obviously I'm not in a position to argue with you, I just say that, ah, I think most people conclude that it would be better for the legis--if you're gonna create a statutory cause of action, for discretionary treble damages, the private enforcement that you spoke of, ah, it's better for the Legislature to specific with particular and then put in the law because that is extraordinary kind of relief that you're, you're expending---

ELLIS : How many, how many--well how many lawsuits you think would be filed, for redlining?

SPILMAN : I have, I have no, I have no idea, Senator, but, ah, there are those in the industry that suspect there would be many.

ELLIS : Usually somebody, somebody who's redlined must be pretty poor anyways. I mean what, what trial--what lawyer would go pick it up?

SPILMAN : When you're talking about redlining are you---
: (inaudible-not speaking into the microphone).

SPILMAN : I don't know the answer to that question.

ELLIS : I think Mr. Kincaid is here.

SPILMAN : That's good.

ELLIS : If I might, Mr. Chairman.

SPILMAN : That's fine.

LEEDOM : Well, let me ask a question.

ELLIS : I'm sorry.

CHAIRMAN : Senator El--ah, Leedom.

LEEDOM : I apologize, we just did some, chopped some good wood in the other room and I'm proud of what we did in there but now in here I'm a little confused. Are we talking about this bill or are we talking about an insurance bill that's gonna deal with the subject of, of what you're concerned, redlining?

SPILMAN : Well this bill does involve--has the insurance provisions in it, ah, ah, Article 2121 of the Insurance Code does---

LEEDOM : I intended to deal, necessarily with the redlining issue, which I understand--I can understand his position on that.

SPILMAN : Well he can make it apply if it---

LEEDOM : Well it would fit in germanely but I'm just kind of curious how many times we're gonna---

ELLIS : Oh, I'm not amending it--already does it. The bill as it, as it is currently written will eliminate a private cause of action.

LEEDOM : For liability, I mean for casualty?

ELLIS : Yeah, but they view accident and health---

LEEDOM : ---casualty bill.

CHAIRMAN : Mr. Spilman, we'll excuse you. Mr. Kincaid would you mind honoring us with your testimony please? We need some institutional

memory about--I don't know, has somebody briefed you on Senator Ellis' question?

KINCAID : Yes they have, Mr. Chairman.

CHAIRMAN : Would you identify yourself for the record please Sir?

KINCAID : I'm Mark Kincaid. Ah, I'm with the law office of Mark Kincaid. (laughter)

ELLIS : Mr., Mr. Chairman if I might ask him a question? Should I ask him?

CHAIRMAN : Senator Ellis.

ELLIS : I don't--Mr. Kincaid you may not have been here when, when I was asking questions earlier. I, I have an amendment that I'm sending up where we would delete the words, accident or health. It's my understanding, with my limited knowledge, just being a country lawyer of this subject matter, that---

SHAPIRO : Is that the country of Houston? (laughter)

ELLIS : ---that this legislation, this legislation would per-- would permit a private cause of action if someone feels as though they've been discriminated against with regard to accident or health insurance. And I wanna delete accident or health and say well if it's good enough for those privileged people who can have accident and health insurance, why wouldn't we just, ah, let someone have a private cause of action all of the, for other kinds of insurance.

KINCAID : Yes Sir that, that's my understanding of what deleting those three words would do, would be to preserve a private cause of action for discrimination because one already exists under the law. But because other changes that are being made this session will cut off rules and regulations, that would also cut off some of the existing remedies for discrimination. And so to try to fix that, those three words would be deleted so that a cause of action would be preserved.

ELLIS : So you'd be for the amendment?

KINCAID : Ah, personally I would be.

ELLIS : Okay. And if we don't put the amendment in, just walk the committee members through it again, what the affect will be by not putting the amendment on.

KINCAID : It's a little bit technical, but right now Article 2121 provides a private cause of action for unfair insurance practices. Those unfair insurance practices under existing law, some of them relate to claims handling, some of 'em relate to misrepresentations. Those have been preserved under the amendments. Other private causes of action that exist right now relate to discrimination, boycott, other kinds of things. Because the rules and regulations are being cut off as a source of causes of action, those other things, like discrimination, would be cut off. For example, Article 2121-5, right now you could sue under it because of the Board orders. Under the amendment you couldn't do that. It's my understanding that this language was proposed as a way of preserving, for discrimination, a cause of action that already exists, what you'd do like you said. Right now that specific language talks about accident and health. You'd take that out so that definition would apply to any other insurer. What you're losing then are other definitions of discrimination that appear in other parts of the Insurance Code. Those would no longer have a private cause of action.

ELLIS : Is there more of an opportunity to make money, ah,

when you leave accident and health in? I assume somebody at the table was trying to make sure that accident and health causes of action were preserved, ah, but there's not as much money if it's in some other line?

KINCAID : I'm not sure why that particular language---

ELLIS : Maybe it's just my cynicism---

KINCAID : Yeah.

ELLIS : ---assuming there's some money flowing around the table.

KINCAID : Well the way existing law is right now, is there's several definitions of discrimination that you could access and sue under. That's just one of them. So it may be that other ones that are being cut off would have provided a cause of action against a different kind of insurance company.

CHAIRMAN : Let me, if I might.

KINCAID : Yes Sir.

CHAIRMAN : You, I understand you were in on the drafting of this.

KINCAID : Ah, I was in on the drafting of the part that would close off the rules and regulations.

CHAIRMAN : What is it?

BIVINS : Yeah, this part of the bill.

CHAIRMAN : So you, you did draft that part, or you were in on it?

KINCAID : Yes Sir.

CHAIRMAN : Did you agree to it?

KINCAID : I need to be real clear. The issue of discrimination was not something that was ever part of our discussions or negotiations or drafting. That was an issue that had come up early on and I think all the people involved in the discussion recognized that, that what we were talking about was what do you do about unfair settlement practices, what do you do about misrepresentations of policies. And so the issue of what do you do about discrimination was set aside, not, not because we didn't agree it was important, we all did, but we all agreed, we weren't the parties to deal with that because that wasn't really the issue for any of us. And so there was a recognition early on that would be dealt with separately. Ah, however, other people decided that should be dealt with and, as I understand it, their argument is because we preserve some of the more important causes of action for unfair settlement practices and misrepresentation, that it makes sense along the same path to likewise preserve an important cause of action for discrimination.

CHAIRMAN : Well a lot of people thought the bill didn't go far enough, and so what I'm trying to figure out is, if would--if there's no deal, and there are a lot of people that wanna go a whole lot further, and so I'm trying to figure out, ah, you know Senator Bivins has been holding them off, you know, kind of friendly fire, and so if there's no deal then maybe we can go into some of the other things that people want to go further. So I'm trying to figure out whether or not there's a deal or not. I mean we're gonna honor, you know--I was in the room part of the time and I understood there was, there was an agreement reached, and don't always agree with all the agreements, however, and you weren't in the room, I mean I'm--you're not bound by this, but if the deal's off, it's off all the way and we can, we can get serious about DTPA if, if we're going to. So I'm asking you, if, if you were in there, was it your understanding that there

was some kind of an agreement, at least among some of the parties who were negotiating?

KINCAID : Not on the issue of discrimination. And, and I need to be as clear as I possibly can on this. Ah, there's a longer history on this. I've dealt with Representative Duncan both in this context, on this language that we have agreed on, and in the context when I was a Public Council on the issue of discrimination, and they're very different because people don't presently use treble damage remedies or lawsuits like the DTPA or 2121 to sue for discrimination. So when we were over there discussing those DTPA unfair settlement practice issues, I believe Representative Duncan and I both recognized that discrimination was a separate animal, even though it's part of the Insurance Code, even though it's got connections, it's not something that people are out there with damage lawsuits over. Obviously the group I was helping with these issues, that's not what they do, they don't file suits for discrimination. So that's what I mean, it's, it's not that we agreed it would be part of the deal or wouldn't, we agreed that it was not an issue that, that was one we needed to negotiate or discuss over because we were focusing on the unfair settlement part and Representative Duncan and I discussed that particular language. He mentioned to me that was a different issue that, that he was talking to other people about, and so we didn't discuss that any more. So on that issue it, it was just foreign to our agreement, not, not that it was part of it, pro or con.

CHAIRMAN : Did you agree, you agreed to this?

KINCAID : I agreed to the language, ah, as it appears, yes Sir.

CHAIRMAN : Do you, do you feel like there was any kind of an agreement as far as the other tort bills that we've already passed and sent on to the Governor's Office, or---

KINCAID : Yes Sir.

ELLIS : Mr. Chairman.

CHAIRMAN : I'm sorry, I think Senator Leedom is up and then I'll get back to you.

LEEDOM : I missed who you represent. Are you on the plaintiff attorney side or----

KINCAID : Yes Sir, I'm the plaintiff attorney side.

LEEDOM : So you're the ones that file suit sooner or later, which is fine.

KINCAID : Yes Sir.

LEEDOM : Now my understanding---

CHAIRMAN : Senator Leedom could you get a little--some people are having trouble hearing you.

LEEDOM : Sure.

CHAIRMAN : I don't want them to miss any of this.

LEEDOM : Alright. It's my understanding in, in accident and in, in health insurance, discrimination occurs in such things as age and, and it's very easy to define where the discrimination is. In other words it's my understanding if, if they begin to turn down applicants because of their age or their sex, because there's some assumption that, you know, women are worse driver than men so they, they discriminate in race. All that is, is easily measured discrimination. Isn't that one--what the definition of discrimination sometimes is in accident and health cases?

KINCAID : I think that would be.
LEEDOM : And, and other things, sometimes prior ill--illness and maybe you had a cousin that died of cancer, therefore they discriminate, you know, all that sort of stuff. In, in property insurance the discrimination occurs basically like it does in mortgage lending, in geographic considerations as I understand it.

KINCAID : Ah---
LEEDOM : Redlining in other words is a, is a geographic situation.

KINCAID : Redlining clearly is a geographic situation.
LEEDOM : And I don't favor it. Couldn't favor anything, but I guess my concern is there are, there is a different consideration when you're indemnifying your--doing this sort of thing, actually, you know, than it is from the other. They are two different universes. I don't know if there should be different paragraphs in the things but if you, ah--the criteria now, the final question I have, you use the word rules, and I've heard rules. The rules that you are concerned with that are being--are written by the Commission---

KINCAID : Yes Sir.
LEEDOM : ---and they're subject to change by the next insurance commission if they care to change the rules for whatever political pressure.

KINCAID : Yes Sir.
LEEDOM : And that goes back and forth as a, as a yoyo sometimes, as it's done on automobile insurance and everything. So I think what I heard from the previous witness, if we are serious about dealing with discrimination we oughta define more clearly what discrimination is, probably in both areas. If we're leaving it up to rules, boy that goes on forever, I mean and I guess I'm concerned that this bill is attempting to more clearly define what obligations and liabilities people have. And I can see that there are two different worlds, casualty insurance and health insurance are just two different animals.

KINCAID : Well---
LEEDOM : And we're trying to make 'em all one animal.
KINCAID : Let me answer with two different hats. My answer as, as a person who helped negotiate the language relating to unfair settlement practices, one of the issues that we recognized and I think we're trying to deal with, and I think succeeded in dealing with, is the idea of clarifying what people's obligations are, put 'em in the statute. That way, you know, I don't think there's really been a lot of yoyo effect with the commissioners but there's always that potential. So put 'em there where everybody knows these are the rules the legislature has, has waved a wand over it, so that part I, I clearly agree with. And the question is, what do you consider important enough to put in the legislation if you're gonna cut off the rules and regulations. On accident and health and property and casualty being completely different universes, I think there may--obviously there are some things about them, I have to put on my former Public Council hat on this, our office did a study under the legislative mandate y'all had given the office to look at underwriting guidelines, and found that over in the accident and health side, some of the guidelines are things like ability to speak English, or citizenship. So there may be different starting points on the two areas but there's also some overlap on the kinds of discrimination that

occur, and I just wanted to make that clear.

LEEDOM : Thank you.

CHAIRMAN : Senator Ellis.

ELLIS : Mr. Chairman. Ah, with regard to, ah, insurance discrimination for, ah, ah, homeowners insurance or automobile insurance, can you just give the committee some sense of what kind of ins--what kind of discrimination, in your judgment, exists. The point I'm trying to--I want you to make is that it's not just a racial thing. I mean this is something that the Eagle Forum, ah, wants to stop.

KINCAID : Ah, that's right. One thing that, that we had found in looking at the issue of geographic redlining, is it, it affects rural folks without regard to their race. It affects intercity people. Now intercity people may tend to be a particular race or not so there may, there may be some disproportionate impact. But the problem is, there are certain assumptions that are being made that can have an impact on an entire neighborhood or entire rural area. So it's not just a race issue, it's, it's--it could be an economic issue as well.

ELLIS : What damage does it do to the bill? I mean this section, I mean to what extent is this the life blood of the bill? I mean if, if that section came out, or, or if you put my amendment in, ah, so that unfair discrimination is unfair discrimination, I mean what, what havoc does that reek on the prog--I know we're into big reform, 'cause we want all these businesses to come into Texas, but I mean what, what will this---

KINCAID : Well that's--Senator that's the point I was trying to make clear in response to Senator Sibley's question. This issue, ah, and I don't mean to demeanor or undermine the importance of it because obviously from my former role I think it's very important, but it doesn't really touch the other issues top-side or bottom. You can do what you want to do. You cannot do what you want to do. You can do other things and it, it really doesn't undermine, add to or detract from the other parts of the bill. That's why we always viewed it as a separate issue that---

ELLIS : So if my amendment went on, which simply eliminated three words, accident or health, it wouldn't damage the intent of the fine author of, of this bill in terms of reforming, ah, the civil remedies in Texas? It could still be one of the--I think it's the one of eleven points. This will be one of the eleven points that are all the disciples could be in agreement on.

KINCAID : I don't think it conflicts with anything that, that's in the bill presently.

ELLIS : Thank you.

CHAIRMAN : Any other questions of the witness? Tell you what we'll do, Senator, ah, Bivins you have a number of amendments.

BIVINS : Uh huh.

CHAIRMAN : Perhaps we could take those in order.

BIVINS : That'll be a good idea.

CHAIRMAN : And then, ah, we'll let--we'll see if people wanna reopen this deal, and ah, we might come up with some good amendments before this is over.

BIVINS : I've that ah, that bill I filed that one of these co-sponsors. I think that we can make some improvements on that.

CHAIRMAN : Let's go through it and we'll, we'll see. If you could

on, ah---

ELLIS : Mr., Mr. Chairman, if I might just ask one question.

CHAIRMAN : Senator Ellis.

ELLIS : From that discussion am, am I to assume that if, ah, somehow just regular people are given the right to have a private cause of action if they're redlined against, ah, that would, in, in your judgment of author's judgment, create such havoc that you'd need to, to go back and, and start this fight over DTPA again? Is that---

CHAIRMAN : I don't know how much--well---

ELLIS : I don't know, I mean I just, although with me I mean I feel strongly enough about the issue that I can't back down on it. But I'm just asking is that a, a deal breaker?

BIVINS : Yes.

ELLIS : Okay, alright. Well let's get on with it.

ROSSON : Well, can I just ask a question?

CHAIRMAN : Senator Rosson.

ROSSON : Why is it a deal breaker if it wasn't part of the deal and has nothing---

BIVINS : It was, it was part of the early discussions and the negotiations on reforming DTPA. And as, as Mark Kincaid said, this issue was raised in the room and both sides felt that it was foreign to this bill and that it was more appropriately dealt with in other legislation, which was, at that time--- (verbiage lost due to changing of the tape).

END OF TAPE 1

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(Senator Sibley in the Chair)

ROSSON : ---I thought it was foreign to the discussion of the real issues that were under attack and discussion for change.

BIVINS : I think you heard Mark just say---

ROSSON : What I heard him say was---

BIVINS : ---it didn't touch---

ROSSON : ---that it didn't, it didn't touch it top-side or bottom and therefore it really shouldn't be a deal breaker because it doesn't--it wasn't part of the deal.

BIVINS : It was discussed and it was decided that it was not gonna be part of this negotiated bill.

ELLIS : Mr. Chairman.

ROSSON : Well what negotiated bill was it part of?

CHAIRMAN : Well as--I think Senator Ellis has five bills.

ELLIS : I was gonna, if I might Mr. Chairman, just respond to that for you.

CHAIRMAN : Well I'm just sort of--Senator Rosson---

ELLIS : I was gonna respond to that point.

CHAIRMAN : ---will you yield to Senator Ellis?

ROSSON : Certainly.

CHAIRMAN : Senator Ellis.

ELLIS : Yeah, I think I do have five insurance bill and I, I think, I'm not sure, all of 'em are pending before this committee, and I've requested hearings and, you know me, I guess, you know, if I get 'em out next week, of course they're Senate bill, unless we get 'em out tomorrow, get 'em off the floor tomorrow, they won't be going anywhere. Ah, so at least if there were some discussion on something that impacted me, ah, and I think I certainly tried to show some leadership on this issue, separate issue, and have tried to be very reasonable on these other issues. I think I voted for every tort reform, you know, I'm up to about eight on eleven points, even on, on judicial campaign finance reform which, you know, which the group has been very helpful with over on the House side. I even sponsored one of 'em, ah, that's moving. But nobody asked me to the table on this issue. In fact I did not know until this morning that this bill was getting involved in my issue. I mean in, in--well I did know yesterday when I saw Commissioner Bomer and he said other bills touched this, and I didn't know what he was talking about until this letter came over.

CHAIRMAN : Senator Ellis, just if I might, since you alluded to something. Ah, we were informed by your staff that you wanted to wait on the Dutton bill, and that's what we did. So---

ELLIS : Well that was--Mr. Chairman, ah, I think about a week or so ago I requested you wait on the Dutton bill, because this late in the session my bills wouldn't go anywhere. And the Dutton bill, which I'll be sponsoring, is certainly a fine bill, ah, but, you know, it's not something that Representative Dutton nor I would have as a first choice. In fact there are some group that would say that if we don't do some substantial work on it, it may do more harm to what we wanna accomplish, than it does good. I don't know, I haven't read it yet.

CHAIRMAN : Well, in some cases maybe 'ole ugly is worse than

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'ole nothing, I don't know what to tell you.

ELLIS : That's why I'd like to leave th--leave this part out of this bill and let the commissioner deal with it. In fact I wish we'd get the commissioner over here, I don't know if that's possible or not, before we finish all these amendments.

CHAIRMAN : Do you--well let me ask you this, do you wanna pass your Senate bill?

ELLIS : I'd love to. I'd like to get 'em all out of here today. At least if they're all up on the floor maybe it'll ah---

CHAIRMAN : Okay.

ELLIS : Okay.

CHAIRMAN : I'm sorry I didn't mean to---

: Not at all.

CHAIRMAN : ---Senator Rosson you suspended, ah--let me go back to Senator Rosson, she's been very patient.

ROSSON : My question is, in, in the commissioner's respond (sic), is it indicated that this needs to be here because he can't do it by rule? And they're saying we can't put it here because he's gonna do it by rule? What, what---

ELLIS : Well what he's saying is---

ROSSON : ---are we gonna get any---

ELLIS : ---the rules that he's considering his, his predecessor, commissioner, two predecessors back, Hunter, ah, sent some rules to the Texas Register. Lightsey, ah, adopted the rules. Commissioner, ah Bomer came in, wanted to review the rules again, so he delayed implementation of them until June 1. And, ah, he had a hearing on yesterday because he will have to decide on June 1, whether to adopt the rules or not, or revise the rules, or, or delay them again. And he sent this letter, I testified yesterday, you signed a letter to him asking him to hold a hearing and then asking him to move forward with the rules. And his letter says, in part, each of the rules we considered yesterday are presently draf--as presently drafted, creates a private cause of action for an individual who believes he or she has been harmed by a violation of the rule. It has been clear to me since I took office that there is strong opposition in the legislature, to the Department's authority to create private causes of action by enacting rules under Article 2121 of the Insurance Code. House Bill 668, which passed the House and is now pending before the Senate Economic Development Committee, removes any private cause of action based on rules or regulations issued by the Department under Article 2121. I believe it would be irresponsible of me to allow new rules which create a private cause of action to go into effect on the eve of expected legislation placing exclusive enforcement authority within the Department. And obviously my concern is that historically the perception has been that the Insurance Department has, from time to time, not always, but been too closely aligned with the industry it regulates. I mean the grand jury, ah, has even issued a, a letter to the state saying you need to look at this. And I think that has changed over the last, ah, you know, couple of years, and I think that that will, will remain changed in the future, ah, under Governor Bush and, and Commissioner Bomer. But clearly, to the extent redlining has been an issue, I think it would be ridiculous of someone to say, you oughta just look to the Department to solve that problem. I mean hopefully you can, but you haven't been able to do that in the past.

ROSSON : Well, it sounds to me like he's saying he's not gonna adopt any rules given the fact that there is movement---

ELLIS : This bill.

ROSSON : ---in the Legislature and, and this bill. The gentleman who testified a little while ago was saying, if you want this done, there is no Black letter law, you should make it Black letter law, it's the Legislature's job to do that. I believe that's what I understood, as opposed to expecting the Commission to do it. We're sitting here with a bill and a vehicle in order, where we can write in Black letter law if that's our desire.

ELLIS : And, and I would certainly try. In fact I'd be, if the author would accept it, I'd load all my bills in, in this one. But the political reality is, the five bills that I introduced, I essentially took the four rules that the insurance commissioner has before him, and had Leg Council put them in Black letter law form and, you know, I, I don't count all that well, but I'm a pretty good counter, to know that that won't be going anywhere. But I'd appreciate the opportunity to discuss it with the public looking at it, but I mean, ah, and the rules have had tremendous editorial support, by the way, from major papers across the state. But I don't--I think that if--I would seriously doubt whether or not the Legislature would adopt it. I just, I don't think the Legislature has the will to take that issue on in a meaningful way.

ROSSON : But what we're taking out here is current law, is that right, Senator Bivins?

BIVINS : This is current law, yes.

ROSSON : This is current law. Not bad law, just current law.

BIVINS : Right.

ROSSON : Why don't we just leave it alone? If it doesn't really deal with the issues that you were addressing---

BIVINS : That's what I wanna do, is just leave it alone.

ROSSON : No.

ELLIS : That's not quite accurate. I mean I've kind of gone back and forth on what this means. I think, if I'm getting it right, 2121, which passed last session, I think, was probably Senator Parker's, right? Or do you remember?

CHAIRMAN : No, I think it was more---

: Five years ago?

BIVINS : Been a while back.

ELLIS : Yeah, yeah, it was amended. Something that we did since I've been here gave the Insurance Commission the ability to adopt, ah, these anti-redlining rules, and by the language in this bill, we will be removing the ability that would exist on June the 2nd. If the Insurance Commissioner adopts those rules on June 2nd, if he adopts those rules, or something similar. Even if he changes, modifies them somewhat, you'd have the ability to go to court and file a private cause of action if you think you've been redlined, based on what those rules say. And this bill will eliminate your ability to do that. So I mean it's kind of a matter of semantics I think, on whether or not--we, we cannot say passing this, all we're doing is just keeping things the way they are. That's not true, because on June 2nd, if those rules or some rules are adopted, you could file a private cause of action in Texas. And I think that's what Mr. Kincaid was--

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that's what I heard him say, Senator Bivins. I don't know if that's what--that's what I got out of that. And I think Mr., ah, the person representing the independent insurance companies---

CHAIRMAN : I mean--yeah, Wade Spilman.

ELLIS : Was it Mr. Spilman?

CHAIRMAN : Any other questions? You wanna go through the amendments?

BIVINS : Yeah, if I could.

CHAIRMAN : Senator, ah, Sibley has sent ah, signed onto eight of these, sent them up.

BIVINS : Thank you Mr. Chairman.

CHAIRMAN : Chair lays out or--Number ah, Amendment Number 1.

BIVINS : Ah, Mr. Pres--Mr. Chairman.

CHAIRMAN : Your honor will do. (laughter)

BIVINS : Your imminent hugeness. Ah, ah, Committee Amendment Number 1 clarifies that a consumer is entitled to recover economic damages and, ah, if it is shown that, ah, the defendant engaged in the conduct knowingly, ah, those economic damages, ah, are subject to being, ah, trebled, where they would reach up to three times--or I'm sorry, up to two times.

CHAIRMAN : Senator Bivins---

BIVINS : Right.

CHAIRMAN : ---I know you are working on these today.

BIVINS : Right.

CHAIRMAN : Could you tell me who was, who was working on those, who were you working with?

BIVINS : Yeah, th--the--how many are there, seven amendment maybe, eight? There are eight amendments that were the result of either technical corrections or drafting glitches that required the House sponsors, the Senate sponsor, the Governor's staff, and the var--the proponents and opponents of this bill, at least two of them, to get together and work through these eight amendments so that I can represent to the Committee today that these are eight agreed amendments that cure problems that were part of the House engrossed version.

CHAIRMAN : Okay, who were the opponents who helped you?

BIVINS : The Texas Trial Lawyer's Association.

CHAIRMAN : Be specific.

BIVINS : Bill Whitehurst, ah, Mark Kincaid, ah, and Mr. Longley was here today.

CHAIRMAN : Good. Okay, any questions on Amendment Number 1?

BIVINS : I didn't finish explaining it, I'm sorry. It also makes it clear that, ah, with regard to mental anguish, ah, ah, a consumer can recover mental anguish damages, ah, on a showing of knowingly, and can, ah, have those damages doubled, ah, on a showing that the conduct was engaged in intentionally.

CHAIRMAN : Any questions of the witness? Chair sends up, ah, Committee Amendment Number 2.

BIVINS : You wanna vote on Number 1? Ah, Committee

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Amendment Number 2 defines the term, intentionally. Ah, that was a result of negotiations between passage of the House version and this committee hearing that reflected our agreement on mental anguish.

CHAIRMAN : Any questions on Committee Amendment Number 2? Okay well maybe we could do these--these seem to be agreed to---

BIVINS : Right.

CHAIRMAN : ---is that correct?

BIVINS : Right.

CHAIRMAN : Is there---

: Mr. Chairman.

CHAIRMAN : Okay, no quorum, okay. Committee Amendment Number 3.

BIVINS : Ah, Mr. Chairman this clarifies that no bodily injury or wrongful death, ah, would be, ah, recoverable under the DTPA, and mental anguish would be recoverable only, ah, if the knowingly standard is met and could be, ah, doubled only if it is engaged in intentionally.

CHAIRMAN : Any questions on Committee Amendment Number 3? Committee Amendment Number 4, the Chair sends up.

BIVINS : Ah, Committee Amendment Number 4 clarifies that, ah, ah, what had been referred to as the back door claimants under DTPA. There are some statutory causes of action, for example in the Debt Collectors Act and the Health Spa Act, where DTPA remedies are, are referenced. And what this amendment is intended to do is clarify that those subjects are not intentional--I'm sorry, are not--that those claimants are not subject to the intentionable standard with regard to mental anguish. Because men--in those cases mental anguish typically is the only, ah, injury that occurs.

CHAIRMAN : Any questions on Committee Amendment Number 4? Chair sends up Committee Amendment Number 5.

BIVINS : Ah, this amendment is a technical or conforming amendment that references mental anguish in the section of the bill that deals with offering a settlement.

CHAIRMAN : Any questions? Chair send up Committee Amendment Number 6.

BIVINS : This amendment, ah, clarifies the transaction limits in the bill on DTPA. Ah, as the bill came out in the House engrossed version, ah, the language on transaction limits was not parallel. That is the hundred thousand dollar limit was drafted a little bit differently than the five hundred thousand dollar limit. What this language does is makes it--make, makes those transaction limits drafted in a parallel fashion so that they won't be confused.

CHAIRMAN : Chair sends up Committee Amendment Number 7.

BIVINS : Committee Amendment Number 7, ah, is necessary to modify the effective date to accommodate the phase-in, or to make this bill fit with the effective date both in the joint and several bill, and the venue bill. If you'll recall, the effective date in those two bills is different. We--the effective date in this bill was modeled after joint and several, but this amendment amends the legislation so that it will accommodate the venue effective date and not create confusion.

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CHAIRMAN : Okay. Chair, ah, sends up Committee Amendment Number 8.

BIVINS : Ah, this is a ah, clarifying amendment that relates to the automatic doubling language. Ah, I can represent it, it's just a technical change.

CHAIRMAN : Okay. Any questions on Committee Amendment Number 8? Okay, Committee Amendments Number 1 through 8 have been sent up. I believe we do, we have a quorum here now so is there objection to Committee Amendment Number 1? Without objection Committee Amendment Number 1 is adopted. (gavel) Committee Amendment Number 2 was sent up. Is there objection to the adoption of Committee Amendment Number 2? Without objection (gavel), Committee Amendment Number 2 is adopted. Committee Amendment Number 3 was sent up. Is there, is there objection to the adoption of Committee Amendment Number 3? Without objection (gavel), Committee Amendment Number 3 is adopted. Committee Amendment Number 4 is sent up. Is there objection to the adoption of Committee Amendment Number 4? Without objection (gavel), Committee Amendment Number 4 is adopted. Committee Amendment Number 5 was sent up. Is there objection to the adoption of Committee Amendment Number 5? Without adoption (sic), Committee Amendment Number 5 is adopted (gavel). Committee Amendment Number 6 was sent up. Is there objection to the adoption of Committee Amendment Number 6? Without objection, Committee Amendment Number 6 is adopted (gavel). Committee Amendment Number 7 was sent up. Is there objection to the adoption of Committee Amendment Number 7? Without objection (gavel), it's adopted. Committee Amendment Number 8 was sent up. Is there objection to the adoption of Committee Amendment Number 8? Without objection (gavel), it's adopted. Now, with the adoption of those amendments, are there other amendments that members wish to send up?

ELLIS : I sent one up Mr. Chairman. The one we discussed earlier.

CHAIRMAN : Chair recognizes Senator Ellis for an amendment.

ELLIS : Mr. Chairman I think it's up there somewhere, members, maybe---

CHAIRMAN : Did you--did he sign it?

ELLIS : You have it?

CHAIRMAN : Yeah, we've got it. Ah, Senator Ellis, ah---

ELLIS : What I do under the Amendment---

CHAIRMAN : ---sends up a Committee Amendment, we'll call it 9.

ELLIS : Mr. Chairman, I offer this amendment, it simply takes existing statute language and applies it to more than health insurance. Ah, in my judgment if it is important enough to protect and preserve the private cause of action for health insurance, then it should be equally, ah, im--as important to apply the same protections to those folks who are seeking coverage in all lines. I move adoption of amendment.

CHAIRMAN : Any questions of the, ah, author? I think it's pretty well been discussed. Do you wanna add anything Senator? Okay. Ah, there is objection. Please call the roll.

CLERK : Senator Sibley.

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CHAIRMAN : No.
CLERK : Senator Rosson.
ROSSON : Aye.
CLERK : Senator Ellis.
ELLIS : Aye.
CLERK : Senator Harris. Senator Haywood. Senator
Henderson.
HENDERSON : No.
CLERK : Senator Leedom.
LEEDOM : No.
CLERK : Senator Lucio. Senator Madla. Senator
Patterson. Senator Shapiro.
SHAPIRO : No.
ELLIS : Mr. Chairman I ask unanimous consent to show
the members who are absent voting aye. (laughter)
SHAPIRO : Good try.
CHAIRMAN : There being two ayes and four nays, the
amendment fails to adopt (gavel). Any other amendments that wanna be--any
member wants to send up? Okay. I ah, you know, Senator Bivins, I know that
you, you know, I saw what you were going through holding the line. You had a
lot of people that wanted you to go a lot further and, ah, you know I'm kind of
caught because I don't think any Senator's bound by agreements they weren't in
on.
BIVINS : Right.
CHAIRMAN : But, ah, you might do some, some--look and see
whether or not there's agreement. If there's not, you might consider, you know,
dusting off some amendments and going for it. Ah, we will, ah, if there are no
other amendments, ah, let's see--(pause) is there anybody here who wishes to be
heard in opposition to the committee substitute, excuse me. Ah, Senator Leedom,
ah, moves to, ah, roll the amendments into a committee substitute.
LEEDOM : I do that.
CHAIRMAN : (pause) Senator Leedom had moved that the, ah,
amendments be rolled into a committee substitute. Is there objection? Without
objection (gavel), it's so ordered. Is there anybody who wishes to be heard
speaking in opposition to the Committee Substitute on, ah, House Bill 668? Is
there anybody who wishes to speak for the Committee Substitute on House Bill
668? If not, that closes the public hearing (gavel). Senator Shapiro moves that
House Bill 668 not pass but the Committee Substitute in lieu thereof do pass and
be printed. Please call the roll.
CLERK : Senator Sibley.
CHAIRMAN : Aye.
CLERK : Senator Rosson. Senator Ellis.
ELLIS : No.
CLERK : Senator Harris. Senator Haywood. Senator
Henderson.
HENDERSON : Aye.
CLERK : Senator Leedom.
LEEDOM : Aye.
CLERK : Senator Lucio. Senator Madla.

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MADLA : Aye.
CLERK : Senator Patterson. Senator Shapiro.
SHAPIRO : Aye.
CHAIRMAN : There being six ayes and one nay, the ah,
Committee Substitute for House Bill 668 is passed with a favorable report.
BIVINS : Thank you Mr. Chairman and Members.
LEEDOM : Mr. Chairman do we vote on, ah, 1094?
CHAIRMAN : No Sir, that bill's gonna be left pending.
LEEDOM : Is that right?
CHAIRMAN : Yes Sir.
LEEDOM : Not enough votes?
CHAIRMAN : Bill's gonna be left pending, Senator, I don't know
any other way to say it. Senator Lucio asks unanimous consent to be shown
voting aye on House Bill 1295, 14--excuse me, 1543, 1298, 3104 and House Bill
668. It does not change the result. Without objection (gavel), so ordered. Senator
Haywood asks unanimous consent to be shown voting aye on House Bill--on the
Committee Substitute for House Bill 668. Without objection (gavel), so ordered.
Is there any other business to come before the Committee? If not now, Members
we have a, we have a meeting scheduled for tomorrow, to hear Senate bills. I got
kind of jammed up, it's just Senate bills. Well, we're trying to let people catch the
last train out of Georgia, is what it amounts to, so your attendance would be
appreciate. We will stand---
LEEDOM : We'll get 'em up next week.
CHAIRMAN : What?
LEEDOM : House Bills next week.
CHAIRMAN : House bills next week, yeah, well except for, ah,
Senator Ellis' Senate bill, we'll hear that.
LEEDOM : You could suspend on the Senate bills.
CHAIRMAN : On adjournment.
 : Tomorrow's Friday.
ELLIS : Think I can kick 'em out tomorrow and get 'em off
the floor?
CHAIRMAN : Stand in recess pending the call of the Chair
(gavel).

END OF MEETING